1968

Harold Robinson and William C. Ward, Dba Crystal Palace Market v. Employers' Liability Assurance Corporation, Limited : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD ROBINSON and WILLIAM C. WARD, dba CRYSTAL PALACE MARKET,

Plaintiffs and Appellants,

vs.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, a corporation,

Defendant and Respondent.

Case No. 11308

BRIEF OF RESPONDENT

Appeal from the District Court of Salt Lake County
Honorable Stewart M. Hanson, Judge

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NATURE OF CASE

This is an action by an insurance company, suing in the name of its insureds, Crystal Palace Market, against another insurance company, to recover amounts paid in settlement of an action brought against Crystal Palace by a third party who claimed injuries resulting from a defective and dangerous condition of the Crystal Palace premises.

DISPOSITION IN LOWER COURT

After filing their complaint seeking indemnification from respondent, appellants moved for summary judgment supported by a copy of a deposition of the third party, Robert E. Kodat, taken in the prior action, copies of the insurance policies involved, a diagram and photograph of appellants' premises, and the affidavit of Raymond M. Berry, attorney for appellants, identifying the other documents. Thereafter, respondent filed its motion for summary judgment which was supported by the same documents, the affidavit of Shirley P. Jones, Jr., attorney for respondent and a copy of the complaint filed against appellants in the prior action. Both motions were heard on May 28, 1968, by the Honorable Stewart M. Hanson who on May 29, 1968, issued a memorandum decision denying appellants' motion for summary judgment and granting that of respondent. Summary judgment was entered on the same date.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment.

STATEMENT OF FACTS

Respondent has no actual knowledge as to many of the facts stated in appellants' brief, but does not generally disagree with appellants' statement. However, one very important fact has been omitted. Inasmuch as

respondent's obligations are controlled by the facts pleaded in the prior action it is necessary to look at the complaint in that action. From an examination of that complaint (R-125) it will readily appear that respondent had no obligation to defend the action brought by Mr. Kodat. Mr. Kodat's action was based upon the grounds that appellants' (defendants in that action) premises were not safe, in that the stairway leading up to the delivery dock was without sufficient handrails or protective devices, that the stairway was in need of repair of which the owners had knowledge and that the stairway was littered with sweepings. In other words, Mr. Kodat's own contention was that his injuries were caused as a result of a dangerous and defective condition of the premises of Crystal Palace Market. Nowhere in the complaint is there any reference to a truck insured by respondent, nor to any loading or unloading.

At the time Mr. Kodat allegedly suffered his injury, he had not started to take any merchandise out of the truck (R-31) and the evidence is unclear as to exactly what he was doing when he went up the steps to the dock at the Crystal Palace Market.

Further, there is a provision in respondent's policy which, as an additional ground, precludes recovery by appellants and which was not cited by appellants in their brief. That is, Exclusion (e) which provides (R-18):

> "This policy does not apply, under Coverage A, to any obligation for which the insured or any carrier as his insurer may be held liable under

any workmen's compensation, unemployment compensation or disability benefits law or, under any similar law.''

ARGUMENT

I

THERE WAS NOT AN ACTUAL USE OF THE INSURED TRUCK BY APPELLANTS IN LOADING OR UNLOADING OF THE TRUCK OR ANY CAUSAL RELATIONSHIP BETWEEN LOADING OR UNLOADING AND THE INJURIES TO MR. KODAT. CONSEQUENTLY, THERE WAS NO COVERAGE UNDER RESPONDENT'S POLICY.

Respondent does not argue with appellants' contentions that the words ''loading and unloading'' are words of expansion or that Utah has generally adopted the ''complete operations'' rule. The Utah case cited by appellants, *Pacific Automobile Insurance Co.* v. *Commercial Casualty and Insurance Co.*, 108 Utah 500, 161 P.2d 423 (1945) does not by any stretch of the imagination extend coverage under the loading and unloading clause to the point that appellants would have it extended here. In *Pacific* the injuries were caused by the driver of the insured truck, directly in the course of making a delivery from the truck. The injuries were to a *third party*, not to an insured under the automobile policy. There was no question of whether the person whose negligence caused the injury was an omnibus insured under the policy. The issue was which of two policies issued to

the brewing company covered the injuries — the general liability policy or the automobile policy. The court merely held that the act of raising the trap door was directly connected with the loading and unloading of the truck and that the automobile policy was applicable. As a matter of fact, the court clearly pointed out that "there must be some causal relationship between the use of the insured's vehicle *as a vehicle* and the accident for which recovery is sought." (Emphasis added), and that the intention of the parties to the insurance contract must be kept in mind in determining coverage. Considering these two points in the present case it is obvious that there is no coverage afforded by respondent's policy. Moreover, none of the other cases cited by appellants are authority for the proposition they urge. As pointed out below, all are clearly distinguishable in one manner or another, but principally because there was a direct causal relationship between the use of the automobile or truck in those cases and the injury complained of. There was no such causal relationship in this case. Decisions which are more clearly in point deny coverage in situations similar to the present one.

A recent case is *General Accident Fire & Life Insurance Corp.* v. *Brown,* 181 N.E. 2d 191 (Ill. App., 1962). There, Employers Mutual Casualty Company had issued an automobile liability policy to Brown Bros. Cartage Co. The policy contained a loading and unloading clause and an omnibus clause almost identical to those contained in the policy issued by respondent here. Under contract, Brown Bros. delivered merchandise for

Libby Furniture Company, who was insured under a general liability policy issued by General Accident. While one of Brown Bros.' employees was carrying two lamps from Libby's dock to Brown Bros.' truck he fell from the loading dock and injured his leg. He filed suit against Libby, claiming that "his injuries were the direct result of Libby's defective, hazardous and negligently maintained dock."

Libby's, through General Accident, tendered the suit to Employers on the ground that the injury was the result of the loading and unloading operation of Brown Bros.' vehicle. Employers denied coverage and a declaratory judgment action was brought by General Accident. The trial court found in favor of Employers and the appellate court affirmed, saying:

> "There must be, as contended by defendant, a causal connection between the use of the truck and the injury. Although a number of cases similar to ours did not contain a discussion of this essential factor, the ones involving a close question of causation, point out that the loading and unloading clause, being merely an extension of the 'use' of the vehicle which is covered by the policy, does not invoke the coverage of the policy unless there is the same degree of causal connection between the loading or unloading and the accident as would be required between the actual driving or use of the vehicle itself and a resulting accident. (citing cases). Thus, unless we can determine that the loading of the truck was the efficient and predominating cause of Blakesley's injury, the matter will not come within the term of Employers automobile policy.

> "On the record before us we cannot say that Blakesley's injury was caused by the loading of the truck. *In his suit Blakesley alleged that his injury was caused solely by Libby's defective dock and their negligence in failing to maintain it. Libby owned and controlled the dock and clearly had sole responsibility for its maintenance.* There were no allegations to the effect that Blakesley's carrying of merchandise in any way contributed to his fall, nor that any merchandise or anything connected with the loading operation or the truck itself in any way caused his injury." (Emphasis added).

The court, noting its satisfaction that the injury was caused by an independent factor or intervening cause wholly disassociated with and remote from the use of the truck, said that even assuming that injury could be said to have been caused by the loading of the truck, the protection of Employers' policy could not be invoked because of a clause excluding liability:

> "to any obligation for which the insured or any company as his insurer may be held liable under any workman's compensation law . . ."

Another pertinent case is *Moore-McCormick Lines, Inc.* v. *Maryland Casualty Co.*, 181 F. Supp. 854 (S.D. N.Y., 1959). An employee of the plaintiff was injured while unloading bags of naptholine onto a truck owned by a construction company, which was insured by defendant Maryland Casualty under an automobile insurance policy containing loading and unloading and omnibus clauses. The employee sued the plaintiff, alleging that his injuries were the result of its negligence

in permitting the bags of naptholine to remain on the deck of the ship while being transported, thereby being subject to exposure to the elements and for allowing an unsafe and dangerous condition to exist. As in the present case, there was no allegation of negligence on the part of anyone but the plaintiff, Moore-McCormick Lines. The plaintiff was insured under a general liability policy and its insurer settled the suit with the employee. It then brought the action against Maryland Casualty, claiming that Moore-McCormick Lines was an omnibus insured under the automobile policy issued to the construction company and that the accident arose out of the loading and unloading of the truck. The court, noting that there was no claim (in the action brought by the employee) of any negligence in the loading of the bags onto the truck which in any way caused or contributed to the accident, said:

> "The case turns on the narrow legal issue of whether an insurance carrier can be charged with liability under a 'loading and unloading' clause of a policy of automobile liability insurance where there is no negligence of any kind claimed in connection with the loading or unloading operation."

The court, pointing out that it was required to rely on the law of the State of New York, whose highest decision in point was that in *Employers Mutual Liability Insurance Co.* v. *Aetna Casualty and Surety Co.*, 181 N.Y.S. 2d 813 (1958), continued:

> "There it was held that no liability could attach under the clause here in issue, in the absence

> of a showing that the accident resulted from the negligence of defendant's insured in the loading or unloading process."

In *Clark* v. *Travelers Indemnity Co.*, 313 F.2d 160 (7th Cir., 1960), Sinclair Refining Co. and its insurer Zurich Insurance Co. brought suit against Travelers Indemnity Co. and its insured Rogers Cartage Co. to recover amounts Sinclair and Zurich had been required to pay to persons injured as a result of an explosion occurring on Sinclair's property.

A gasoline truck belonging to Rogers had pulled up at the Sinclair bulk petroleum plant to be loaded. While it was being loaded and as the result of faulty equipment of Sinclair's, the truck overflowed and gasoline spilled on the ground. Shortly thereafter a gasoline truck owned by a third party pulled up and Sinclair's employee began loading that. A gasoline truck owned by Sinclair then pulled up behind the other two and immediately thereafter the explosion occurred. Persons injured as a result of the explosion brought suit against Sinclair, which was settled by its insurer Zurich.

The trial court found that Travelers was required to indemnify Zurich by reason of an automobile liability policy issued to Rogers which contained the usual loading and unloading and omnibus clauses. The Court of Appeals, in reversing, held that there was an inescapable inference that use of Sinclair's truck was the proximate contributing cause of the occurrence and that the finding of the trial court to the contrary was clearly erroneous. It continued:

"... the explosion was caused by factors for which Sinclair had the sole responsibility, factors 'wholly disassociated with and remote from' the use of Rogers' truck. Consequently, the loading of the Rogers' unit was not the efficient and predominating cause of the explosion."

The court stated that it would require a strained construction to make the language of the policy applicable to the injury merely because of the *presence* of its truck during the loading operation and that while the explosion occurred during the loading operation it did not arise out of such operation. Distinguishing cases relied upon by the plaintiffs, it said that there was no question in such cases of the negligent maintenance of the additional insured's premises for which responsibility was sought to be imposed on the automobile insurer, nor any issue concerning a causal connection between the negligence and the loading operation.

In discussing the intent of the parties in connection with the rate paid by Rogers for the coverage, it said:

"Under the terms of the policy Rogers, the named insured who paid the premiums, is in effect a self-insurer of any liability which it may incur up to $10,000. To that extent Rogers was without protection. In contrast, Sinclair, an unnamed insured who paid no premiums, claimed protection in full for all liability which flowed from its own negligence. This liability was discharged by Zurich, its insurer, and as we understand is included in the judgment against Travelers. This means that Sinclair was afforded greater protection on a free ride than was Rogers who was paying the freight."

Such language is especially applicable to the facts in the present case.

In *Rogers* v. *Continental Casualty Company*, 155 So. 2d 641 (Fla., 1963), Continental had issued to a trucking company an automobile policy containing the usual omnibus and loading and unloading clauses. The trucking company was engaged in hauling barges which were being lifted onto its trucks by a crane company. An employee of the crane company had loaded one truck and was swinging out to get another barge when the crane came in contact with a high tension power line. As a result, the employee riding the crane and another were injured. Suit was brought against the crane company and the operator. The question was whether Continental had a duty to defend the operator or pay any liability imposed upon him as a result of the accident. It was argued that he was loading the trucks and thus was an additional insured under Continental's policy. In holding that Continental had no obligation to defend, the court said that the many cases cited by the plaintiff were not in point, because there was no question of causal connection between the accident and the loading and unloading of the vehicle in those cases. It held that a causal connection was required, and stated:

> "An accident is causally connected with the process of loading or unloading within the meaning of the clause, if the loading or unloading was its efficient and predominating cause."

Holding that it was not necessary to decide whether

the "coming to rest" doctrine or the "complete operations" doctrine applied, the court continued:

> "But where, as here, the injury is caused by a third party who is not connected with the truck, and who has no legal relationship to the named insured and who under normal circumstances would not be using the truck of the named insured, it must first appear before the liability provisions of the policy become applicable that such third party was in the actual use of the truck at the time of the injury, with the express or implied permission of the named insured."

It should be noted that the policy issued by respondent in the present case requires that the omnibus insured be in "actual use" of the automobile.

Hartford Accident and Indemnity Company v. *Fireman's Fund Indemnity Company*, 298 F.2d 423 (7th Cir., 1962) was a case in which Hartford had insured a rural gas service company under an automobile policy containing a loading and unloading clause. Fireman's Fund, insured the company under a general liability policy excluding coverage with respect to the loading or unloading of vehicles. A delivery man of the company, delivering a tank of propane gas to a customer, went to the wrong house where he turned on a propane tank and found that it was not empty. The occupant of the house advised him that they had not ordered the gas and he then delivered the gas to the proper customer. He failed to turn the tank, which had been disconnected from any appliance, back off. Thereafter there was an explosion

in the house, resulting from the gas tank being turned on. Hartford paid the damages after Fireman's Fund's refusal to do so and then brought suit to recover the amount from Fireman's Fund. The court found in favor of Hartford, saying:

> "Olsen's turning the valve had nothing to do with unloading the truck. His assigned use of the truck was to deliver a tank of propane gas to Elmer Dickens who lived in another house. His negligent act was not a part of the delivery of the tank to Dickens. It had no relation to or connection with unloading or delivery. Neither the tank nor the truck, including its equipment, was used by Olsen in the commission of his negligent act. In mistakenly turning on the valve, Olsen did something independent of and entirely removed from his use of the truck for the business purpose of his trip . . .
>
> "The mere fact that the negligent act occurred before the unloading or delivery was completed *is of no consequence where such negligence has no relation to it and did not arise out of the use of the motor vehicle* as defined within the limits of Hartford's policy provisions." (Emphasis added).

The court then said that even though its jurisdiction followed the "complete operations" rule, the explosion and occurrences leading up to it did not come within the loading and unloading provision of Hartford's automobile policy and Fireman's Fund was liable under its general liability policy.

A New York case which points out the inapplicability

of the *Wagman* case, cited by appellants, is *Eastern Chemicals, Inc.* v. *Continental Casualty Company*, 199 N.Y.S.2d 48 (1960). There, a trucking company was engaged to haul products for Eastern Chemicals. While it was engaged in such hauling, but when there was no activity in the unloading process, one of the containers on the truck exploded, and the truck driver was injured. Continental insured the trucking company under a policy containing the usual loading and unloading and omnibus clauses. The truck driver sued Eastern Chemicals and it and its insurer brought suit to compel Continental to defend the action, upon the basis that plaintiff was an additional insured under the policy. (It will be noted that the relationship of the parties was identical to that in the present case.) The court in holding that Continental had no liability said:

> "Since the adoption in this state of the 'complete operation' doctrine in the matter of loading and unloading by the Court of Appeals in Wagman v. American Fidelity & Casualty Co., there can be no doubt that Eastern would be an additional insured of Continental if the accident in which Mitchell was injured was caused by some negligent act in the loading or unloading.
>
> "In the Wagman case as well as in those which have followed it to the same conclusion, there was no question about negligence causing the damage during the loading or unloading process. In that case the claim of the injured person was for negligence on the part of one engaged in the complete operation of loading or unloading . . .
>
> ". . . we are presented with a different prob-

lem. Here the injured person, Mitchell, by his own affidavit, expressly disclaims any negligence in loading or unloading either in the former narrow sense or in the now 'complete operation' sense. If he makes no such claim, there is no coverage for the named insured, Dubrey, or for any unnamed insured . . . Even standing by itself, and with all the liberality to be given to the construction of a pleading, it would take a very strained construction to so hold in the light of the negligence charged against Eastern by way of 'allowing the shipment of an inherently dangerous product without adequate safeguards . . . Here, the injured person expressly said that his injuries occurred through causes wholly unrelated to 'loading and unloading' in any sense. On the basis of such claim by the injured person, there is no coverage for either the named or unnamed assured.''

In *Travelers Insurance Company* v. *Buckeye Union Casualty Co.*, 172 Ohio S.T. 507, 178 N.E.2d 792 (1961), the defendant had issued an automobile policy containing the general loading and unloading and omnibus clauses to an owner of a tank truck. At the time of the accident, the insured vehicle was on the premises of a bulk diesel fuel station, an employee of which moved a pipe toward the truck in order to fill it. A quantity of diesel fuel rushed out of the pipe and knocked the truck driver off the truck onto the ground. The plaintiff, who was insurer under a policy of premises liability insurance covering the fuel station, claimed that the automobile policy covered the liability of the owner of the fuel station and that its policy was merely excess insurance.

The court held that the fuel station employee was

not using the truck for any purpose at the time of the accident so as to have liability for his negligence come within the coverage of the policy of insurance covering the truck and said:

> "Although 'using' and 'actual use' do not have the limited meaning of 'operating' or 'actual operation' . . . neither can such words be extended beyond what may reasonably be implied from the circumstances of the case or the relationship of the parties. Where third parties are involved, it cannot be validly claimed that mutual acquiescence constitutes permissive use until some particular use of the truck appears which may be the subject of acquiescence."

The court noting that there was no movement by anyone of anything which had any relationship to the *purposeful* presence of the truck continued:

> "To accord to this policy the construction which Travelers claims was intended leads to the conclusion that McCracken paid premiums to Buckeye so that Buckeye would insure and protect Gulf against the claims of McCracken. It seems doubtful that the parties to the contract so intended. In our opinion, Gulf's employee was not using McCracken's truck for any purpose. He was not therefore an 'insured' under the policy issued by Buckeye."

This case was followed by the Ohio court in *Buckeye Union Casualty Co.* v. *Illinois National Insurance Co.*, 206 N.E.2d 209 (1965), where a store employee slammed a trunk lid on a customer's head while loading groceries in an automobile. The court held that there was

not an actual use of the automobile by the named insured or with his permission and further said that the clause cannot be used to extend coverage for injuries to an insured:

> "The action to be defended by Illinois must be against an insured of Illinois. Under this holding, we can never arrive at a finding that the insured may be a claimant against a company which has computed the risk to protect the insured only against the claims of others."

In *Zurich General Accident Insurance Co.* v. *American Mutual Life Insurance Co.*, 192 Atl. 387 (N.J., 1937), the insurer was held not liable for damages resulting when the insured's driver delivered a can of milk and some ice to a customer's place of business. After he had unloaded them from the truck and was about to place them in the customer's ice box, the customer was injured by an ice pick in the driver's pocket. The court therein stated:

> "The contracting parties plainly contemplated an accident immediately identified with the ownership, maintenance, use or operation of the vehicle and the mishap which befell (the customer) does not fall into that category. The words (of the loading and unloading clause) relate to the vehicle itself, and exclude accidents which are only remotely connected with its ownership, maintenance, use or operation. A construction that would include within a coverage clause so phrased, the thing being done when this accident happened would impart to it an artificial meaning at variance with the apparent intention of the parties."

In *Travelers Insurance Co.* v. *Employers Casualty Co.*, 370 S.W.2d 105 (Texas Civ. App., 1963), three persons were killed by the collapse of a crane loading onto trucks insured by the defendant. The general liability insurer of the crane company tried to recover from the insurer of the trucks under the loading and unloading clause. The court in denying recovery said:

> "We think also that coverage under the 'loading and unloading' provisions includes a requirement of showing some causal connection between the loading or unloading and the accident . . . In this case, so far as the record shows it was a defect in Borders crane which caused the accident, not anything done in the unloading of Capitol's truck. The connection between the accident and unloading of the truck seems too remote to include coverage of the accident under Capitol's policy."

Other cases which require a direct causal connection between the actual loading and unloading of the truck and the accident are *Travelers Insurance Co.* v. *American Hardware Mutual Insurance Co.*, 209 N.E.2d 344 (Mass., 1965); *Morgan* v. *New York Casualty Co.*, 188 S.E. 581 (Ga., 1936); *Kaufmann* v. *Liberty Insurance Co.*, 264 F.2d 863 (3rd Cir., 1959); *Bituminous Casualty Corp.* v. *Hartford Accident and Indemnity Co.*, 330 F.2d 96 (7th Cir., 1964); *Ferry* v. *Protective Indemnity Co.*, 38 A.2d 493 (Pa., 1944).

The foregoing cases clearly establish (1) that there must be a causal relationship between the loading and unloading of the automobile and the injury complained

of or, specifically, that the use of the automobile must be the efficient and predominating cause of the accident; (2) that considering the intent of the parties such provisions cannot be construed to extend coverage for injuries to an insured resulting from the negligence of a third party, as the insurance company has computed a risk to protect the insured only against the claims of others; (3) that in the action for which indemnity is sought, there must be some allegation regarding the use of the insured automobile, and, in fact, an actual use thereof.

An additional case basing lack of coverage upon the last point is *Morgan* v. *New York Casualty Co.*, 188 S.E. 581 (Ga., 1936). Employees of the plaintiff, who was covered by an automobile policy with a loading and unloading clause, were unloading coal down a chute. They left the chute open and a pedestrian fell through it. The pedestrian brought suit against the plaintiff alleging that he was negligent in leaving the coal chute open and unattended and not placing a rail around the same or a red light or other warning to warn pedestrians of the danger. The court holding that the automobile insurer was not responsible said that there was no claimed injuries resulting from negligent operation from the use of the truck in any way:

> "Of course, insofar as the allegations of the (pedestrian's) petition show, the coal may have been hauled to the coal chute in a wagon or rolled there in a wheelbarrow. In other words, there is nothing in that suit that in any way connects the

> use of the automobile truck covered in the insurance contract with the open coal chute . . . So it clearly appears in the allegations of the Freeman petition that the proximate cause of his injury was not from the use or operation of the truck transporting of materials or merchandise and loading or unloading but the proximate cause of his injuries was his falling into an open and untended coal chute."

As stated earlier, and as will be shown below, all of the cases cited by appellants are distinguishable. In *Bobier* v. *National Casualty Co.*, 143 Ohio 215, 54 N.E.2d 798 (1944), one of the cases cited by appellants, the injuries resulted to a third party from acts involved in the loading or unloading. There was no question of causation or of the other factors mentioned above. More recent decisions from the State of Ohio support defendant's position in this case.

In *Wagman* v. *American Fidelity & Casualty*, 304 N.Y. 490, 109 N.E.2d 592 (1952), the injuries again were caused to a third party by an employee of the store. The case was decided upon the basis that the store's liability was vicarious, thus it could recover from its negligent employee any amounts it had been required to pay because of its vicarious liability. The employee was an additional insured and the store had a cause of action against both its employee and his insurer.

In that case the employer had been sued by the injured third party and then cross-claimed against its employee Wagman. Not only was there no question of

causation, but the injuries were caused by the negligence of the employee not the store.

Industrial Indemnity Co. v. *General Insurance Co. of America*, 26 Cal. Rep. 2d 568 (1962) was also a case of vicarious liability on the part of an employer whose employees were not covered by his general liability policy. Hence, the court held that the defendant's automobile policy was primary. The same elements that distinguish the prior cases distinguish this one. The court further pointed out that if the employees had been covered by the plaintiff's policy that insurance would be primary, not the automobile insurance policy.

Travelers Insurance Company v. *W. F. Saunders Sons, Inc.*, 18 App. Div. 2d 126, 238 N.Y.S.2d 495 (1933) is further distinguishable on the same basis as the preceding cases. It involved the question of one vicariously liable recovering from his employee who was deemed to be an omnibus insured under the loading and unloading provision. There was the lack of a question of causal relationship. New York decisions which are more closely in point to the present case reach a different result.

In *Drew Chemical Corp.* v. *American Fore & Loyalty*, 218 A.2d 875 (N.J., 1966) there again was the question of vicarious liability on the part of the insured employer but the question of causal relationship was specifically discussed. Such causal relationship was held to have existed, the court saying that "all that is required to establish coverage is that the *act or omission which resulted in the injury* was necessary to carry out the

loading and unloading." (Emphasis added). The act or omission in that case was clearly part of the unloading process because they were clearing a hose which was connected to the truck and used to unload the acid into a tank.

In the present case it cannot be said that the act or omission which resulted in the injury was in any way related to the loading or unloading. The act or omission which caused the injury according to the injured party himself was the negligent maintenance of unsafe condition of plaintiff's stairs and loading dock. It certainly was not necessary to the unloading of any of plaintiff's merchandise that they maintain an unsafe and dangerous condition on their premises.

In *Float-Away Door Co.* v. *Continental Casualty Company*, 372 F.2d 701 (5th Cir., 1967) there was no question of causation. The injuries resulted to an employee of a third party as a direct result of the negligent loading of the truck. The principal issue was whether there could be any liability when the injury occurred after the omnibus insured had completed the loading operation. The court held that since the omnibus insured was covered as an insured while using the vehicle, the extent of coverage should be measured by the clause obligating the insurer to pay damages "arising out of the ownership, maintenance or use of any automobile," and said "clearly the accident 'arose out of' the negligent loading of the trailer by Float-Away, at which time it was an additional insured under the policy." The

court on petition for rehearing clearly distinguished between a situation where the injured person was an employee of the named insured and where he was employed by a third party. The injured person in Float-Away plainly contended in his action against the omnibus insured that his injuries arose out of the negligent loading of the vehicle; not because of an unsafe condition of its premises. The requirement that the loading and unloading of the automobile must be the efficient and predominating cause of the accident, was met.

The court in *McCloskey & Co.* v. *Allstate Insurance Co.*, 358 F.2d 544 (D.C. Cir., 1966) did discuss the question of causation. The court, *merely applying the complete operations rule*, indicated that the unloading had begun at the time of the accident, said both parties had litigated the case on the implicit premise that negligence in the handling operation of the crane had caused the accident and that, assuming this to be so, the preparatory acts involved in unloading were an efficient and predominating cause of the accident. The case was remanded, however, so that the insurer could present any defenses it might have to negative any conclusion that the injury arose out of the unloading process.

In many of the cases cited by appellants, the injured party had claimed that his injuries arose out of what was eventually determined to be the loading or unloading process. That is not the situation in the present case where the injured employee claimed and the facts

establish that the injuries arose out of conditions in no way connected with the loading or unloading process.

Thompson Heating Corp. v. *Hardware Indemnity & Insurance Co.*, 74 Ohio App. 350, 58 N.E.2d 809 (1944) was a case somewhat similar to *Pacific Auto*, the Utah case, in that the plaintiff was the named insured under two policies—one a general liability and the other an automobile liability. The question was which of the two afforded coverage. The court pointed out that the truck from which the hose was extending was specifically manufactured for blowing rock wool. Hence, the accident arose during the unloading process. The case affords respondent considerably more comfort than it does appellants as pointed out under Point III below.

In *Hertz Corp.* v. *Bellin*, 288 A.D.2d 1101, 284 N.Y.S.2d 140 (1967) the facts were not stated in the report of the case. It isn't even possible to tell who was injured. The most it indicates is that when an injury results from an employee pushing an empty dolly after unloading a truck it is part of the unloading process.

The only case cited by appellants which is difficult to distinguish is that of *Continental Casualty Company* v. *Duffy*, 26 A.D.2d 60, 272 N.Y.S.2d 470 (1966). However, its persuasiveness is somewhat diminished when the same court in the same volume of the reports concludes, under a fact situation remarkably close to the present case, that there was no causal connection and hence no coverage. In *Brooklyn Eastern Dist. Terminal* v. *Phoenix of Hartford Ins. Co.*, 26 A.D.2d 267, 272 N.Y.S.2d 443

(1966) the injured party in the prior personal injury suit had been injured when he slipped from a platform while loading a truck at the plaintiff's warehouse. He alleged in his complaint against the plaintiff that the accident was caused by the negligence of the plaintiff in permitting grease to accumulate on the loading platform of the warehouse premises which rendered the platform slippery and dangerous. The court pointed out that there was no allegation of negligence in the actual loading or unloading of the truck. While it was true that the accident occurred during the loading process, *it was not the result of any act or omission incident thereto.* The accident, it said, could have happened to any one who walked on the platform (as it could have in the present case.) It thus did not arise out of the complete operation of moving goods to or from the truck. Summary judgment in favor of the defendant insurer was affirmed.

Appellants, in their brief, appear to admit that there was no causal relationship between the use of the truck and the injuries to Mr. Kodat, but say that "nothing in the automobile liability policy requires the accident be proximately caused by use of the truck." Of course, automobile policies generally do not specifically provide that the injury must be "proximately caused" but the question of proximate cause is always present. As stated in the *General Accident* case, supra., there must be the same degree of causal connection between the loading or unloading and the accident as would be required between the actual driving of the vehicle itself and the resulting accident. Here, there was no connec-

tion. Mr. Kodat's injuries resulted, he alleged, from the defective and dangerous condition of the appellants' premises. There is no support in the record for appellants' statement that if Mr. Kodat had not been carrying the bills of lading in his left hand he would not have slipped. If that was the case, then the injuries were caused by Mr. Kodat's own negligence, and there was no liability.

All that appellants are really doing in this case is restating the complete operations doctrine, and that is all the cases cited by them stand for. Respondent does not quarrel with that doctrine but contend that the accident must not only have occurred during the loading or unloading process but must have been caused by it. In some of the cases cited above the accidents were much more closely connected with an actual loading or unloading of the vehicle than in the present case, but since the loading or unloading was not the efficient and predominating cause of the accident there was no coverage.

II

RESPONDENT HAD NO DUTY TO DEFEND APPELLANTS AGAINST THE SUIT BROUGHT BY THE INJURED THIRD PARTY FOR THE REASON THAT THE COMPLAINT CLEARLY EXCLUDED COVERAGE UNDER RESPONDENT'S POLICY.

Innumerable cases establish that a liability insurer has no duty to defend an insured unless the complaint

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or petition in the suit alleges facts which, at the very least, may bring the case under coverage of the policy. The cases to that effect are so numerous that it would serve no purpose to cite, but a few of the more recent ones. One such case is *Paulin* v. *Fireman's Fund Insurance Co.*, 403 P.2d 555 (Ariz., 1965). The plaintiff while driving in his car stopped and grabbed a lady private detective who had been following him and forceably held her in the car until the police arrived. She thereafter brought suit for assault and battery and false imprisonment, the defense of which was tendered to defendant. Defendant declined defense on the grounds that the policy did not provide coverage for injuries intentionally caused by the insured. Appellant contended that the insurance company could not refuse to defend against a suit by a third party on the grounds that the allegations of the complaint excluded coverage when the facts known, are reasonably ascertainable by it, indicated that the claim was covered. The court rejected this contention and held for the insurer, stating:

> "The great weight of authority in the United States seems to be that the obligation of the liability insurance company under policy provisions substantially the same as now before us is to be determined by the allegations of the complaint to be defended (citing cases)."

In *Town of Tieton* v. *General Insurance Company of America*, 380 P.2d 127 (Wash., 1963) the plaintiff town had been sued by an individual who claimed that his well had been contaminated when the town constructed a

sewage lagoon. The complaint alleged three causes of of action: (1) negligence in the construction of the sewage lagoon; (2) an unconstitutional damaging; and (3) nuisance. The insurance company which had issued a liability policy to the town covering damages "caused by accident" refused to defend the town on the last two counts. The Washington court in holding for the insurers stated:

> "The duty to defend under such provision is determined by the allegations of the complaint . . .
>
> "While an accident may occur without negligence, a complaint, alleging an unconstitutional taking or damaging, or nuisance, by itself, does not allege an accident . . . Since the allegations accompanying these theories do not allege facts constituting an accident, appellant was justified in refusing to defend respondent at the second trial."

Another pertinent case is *Crist* v. *Potomac Insurance Company*, 413 P.2d 407 (Ore., 1966). The defendant had issued a property damage policy to plaintiff which contained an exclusion as to "property controlled by the named insured, property in the care, custody or control of insured or property as to which the insured for any purpose is exercising physical control."

One Roberts had contracted to move logs for plaintiff by means of a shovel loader belonging to Roberts. One of plaintiff's employees without authorization and in the absence of Roberts' operator attempted to operate the loader, tipping it over and damaging it. Roberts

sued plaintiffs and the case was settled by the payment of $2,500 by plaintiffs. The insurance company refused to defend the action upon the ground that the complaint by Roberts excluded coverage. The court upheld the refusal to defend saying:

> "This court adheres to the rule that the obligation of the insurer to defend is to be determined by the allegations of the complaint filed against the insured."

Inasmuch as the complaint showed that the employee was operating the loader, and hence was in physical control of it, the exclusionary clause applied and there was no coverage. The court concluded:

> "Hence, we hold that the complaint in the Roberts case failed to state a claim against the present plaintiffs covered by the policy, and the defendant insurance company was, therefore, under no obligation to defend the action."

Appellants cite several California cases holding that in some instances the insurer is bound to defend if the facts known to it indicate there is coverage regardless of the allegations of the complaint. This is definitely only a minority rule and even in jurisdictions where followed, the complaint must present, at the very least, the possibility that damages covered by the policy might be obtained. In *Gray* v. *Zurich Insurance Co.*, 419 P.2d 168 (Cal., 1966) the complaint was for bodily injury which was clearly covered by the policy except for an exclusionary clause relating to intentional injuries. Deciding that there was a duty to defend the court noted that "since

the policy sets forth the duty to defend as a primary one and since the insurer attempts to avoid it only by an unclear exclusionary clause, the insurer would reasonably expect, and is legally entitled to such protection."

That the reasoning of *Gray* would not be extended to cover the facts of the present case is evidenced by an apt discussion therein:

> "The insured counters with the contention that this position would compel an insurer 'issuing a policy covering liability of the insured for maintenance, use or operation of an automobile . . . to defend the insured in an action for damages for negligently maintaining a stairway and thereby allegedly causing injury to another — because the insured claims that the suit for damages was false or groundless'. The 'groundless, false or fradulent' clause, however, does not extend the obligation to defend without limits; it includes only defense to those actions of the nature and kind covered by the policy."

Theodore v. *Zurich General Accident Liability Insurance Co.*, 364 P.2d 51 (Alaska, 1961), cited by appellants, specifically states that the obligation of the insurer to defend is controlled by the allegations made in the complaint. There the complaint was sufficient, but the insurer felt that the allegations did not state the true facts. The question of reasonableness of the settlement was not discussed. The court merely held that the insurer after breaching its duty to defend did not have the right to later show that there was no coverage. Respondent does not argue with that case in any way, but it is not applicable.

III

ASSUMING THAT THERE IS COVERAGE UNDER RESPONDENT'S POLICY, APPELLANTS HAVE THE BURDEN OF SHOWING THAT THE SETTLEMENT WAS A REASONABLE ONE AND IN GOOD FAITH, AND THIS BURDEN INVOLVES THE DETERMINATION OF A DISPUTED QUESTION OF FACT.

Appellants' statement that once a duty to defend is breached, the insurer becomes liable to indemnify the insured for the entire loss resulting from the breach is not supported by the cases—not even those cited by appellants. In *Thompson Heating Corporation* v. *Hardware Indemnity & Insurance Company, supra*, for example, the trial court found that there was no duty to defend and granted summary judgment for the insurer. On reversal, the supreme court noted that if there had been a sufficient finding that the settlement made by the insured had been a reasonable one and made in good faith, it would enter judgment for the plaintiffs. Since there was not a sufficient finding of reasonableness the court remanded, noting that the burden of proof was on the plaintiff to show that the settlement was reasonable.

In *Richie* v. *Anchor Casualty Co.*, 286 P.2d 1000 (Cal., 1955) the court stated that the refusal to defend gave the plaintiffs "the right to make any *reasonable* and bona fide compromise of the action against them." (Emphasis added.)

To the same effect was *Theodore* v. *Zurich General Accident and Liability Insurance Company, supra,* and *Arenson* v. *National Auto & Casualty Insurance Company,* 310 P.2d 961 (Cal., 1957).

Other cases cited by appellants do not hold otherwise, In the *Lowe* and *Gray* cases, for example, there had not been a settlement but a judgment entered against the insured, so the question of reasonableness was not raised. *Missionaries of the Company of Mary, Inc.,* v. *Aetna Casualty & Surety Co.,* 230 A.2d 21 (Conn., 1967), like the *Theodore* case, did not deal with the question of reasonableness but whether the insurer after breaching its duty to defend could then attempt to show that there was no coverage. Nor was the question of reasonableness discussed in *Kong Yick Investment Co.* v. *Maryland Casualty Co.,* 423 P.2d 935 (Wash., 1967). There the only question was whether the complaint stated facts which came within coverage of the policy.

In the present case, it would appear from Mr. Kodat's own deposition (R. 31 lines 9-11; R. 33 lines 15-22; R. 35 lines 6-29; R. 49 lines 15-30; R. 50 lines 1-13) that the injuries to Mr. Kodat were, at the very least, contributed to by his own negligence. Thus, a settlement of $15,000 was not reasonable and (assuming coverage) respondent should not be liable to indemnify appellants' insurer, simply because appellants' insurer elected to pay a wholly unjustified claim in the hope of forcing some kind of a contribution from respondent.

IV

COVERAGE IS EXCLUDED BY A PROVISION IN THE POLICY MAKING THE POLICY INAPPLICABLE TO ANY LOSSES COVERED BY WORKMEN'S COMPENSATION LAW.

Exclusion "e" of respondent's policy provides:

> "This policy does not apply, under coverage 'A' to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation law . . ."

In the present case the injury to Mr. Kodat was an obligation for which the named insured, Associated Foods, Inc., was liable under the Utah Workmen's Compensation Law. In fact, the State Insurance Fund paid to Mr. Kodat the sum of $10,269.64, more than two-thirds the amount of the settlement. From the settlement made with Mr. Kodat, the State Insurance Fund having actually joined with Mr. Kodat in instituting the suit against appellants, recovered the amount it had paid (R. 59). If appellants should be entitled to recover from respondents in this action, the State Insurance Fund would, in effect, be recovering amounts it paid out to Mr. Kodat under an obligation to do so by contract with Associated Foods, Inc. Such result is excluded by the policy and also by the Workmen's Compensation Act. Section 35-1-60, Utah Code Annotated, (1953) provides:

> "The right to recover compensation pursuant to provisions of this title for injuries sustained by an employee . . . shall be the exclusive remedy

against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever at common law or otherwise to such employee. . . ."

While this action is not directly against the employer, the result is the same inasmuch as it pays the premiums both to the State Insurance Fund and to respondent. These premiums are affected by the number of claims made under the policies.

The only exception to Section 35-1-60 is Section 35-1-62 Utah Code Annotated 1953, which allows the employee to bring an action against a third party whose wrongful act has caused the injuries complained of. Here, however, the action is not against the negligent third party but by it.

Whether or not the above provision of the policy and the Workmen's Compensation Law prevent plaintiff from recovering all the amounts paid to Mr. Kodat, they would at least be precluded from recovering the amount for which the State Insurance Fund was the real party in interest.

V

EVEN ASSUMING LIABILITY, APPELLANTS' POLICY PROVIDED PRIMARY COVERAGE.

The Utah cases cited by appellants, *Russell* v. *Poulson*, 118 Utah 2d 157, 417 P.2d 658 (1966), deals with the

situation, as does several of this court's prior decisions, where both policies were for automobile liability. They covered the same type of risk. The reasoning in those cases should not apply to a situation where there is one policy specifically intended for and covering a certain type of risk and another policy which may happen to include the loss within its scope. There have been a number of tests to determine primary and excess insurance. One often advanced by the courts is that where there is a specific and a general policy the specific policy is primary. See *Couch on Insurance 2d.*, Section 62:59.

The claim against appellants in this case clearly arose out of an alleged defect in their premises for which they would be covered under United Pacific's policy. It would be the more specific policy.

Another factor, which frequently determines whether coverage is excess or primary or indeed whether there is coverage at all is the intent of the parties to the insurance contract. As stated in a number of the cases cited herein, it is doubtful that the parties to respondent's policy had intended that a third party who had no connection with the contract would be covered under the policy for injuries resulting from its own negligence and not even of the type for which the insurance was written.

CONCLUSION

Appellants were sued for an injury resulting allegedly from their own negligence in maintaining unsafe and defective premises. Their insurer, who is the real party in interest in this case, and who issued a policy to appellants specifically covering such situations, now attempts to place liability upon the insurer of the injured person and his employer who wrote a policy to cover liabilities for injuries arising out of the use of an automobile. The injured party in his action against appellants made no claim whatsoever that his injury arose out of the use of an automobile or that loading or unloading caused the injuries. In fact it did not. Apart from the question of intention there are various other reasons why as a matter of law summary judgment was properly granted to respondents:

1. Appellants were not using the automobile insured by respondent in any sense of the word and more specifically, there was no *actual* use of the vehicle by them as the policy requires in the case of unnamed insureds.

2. Even if appellants could be said to have been using the automobile insured by respondent, there was no causal relationship between the use of such automobile and the injury complained of. The injury was caused by factors for which appellants had sole responsibility, and factors which were wholly disassociated with and remote from the use of an automobile. Such use was not the efficient and predominant cause of the injury.

3. Respondent had no obligation to defend appellants or provide coverage to them, because there was no allegation in the action brought by the injured party that in any way connected the automobile insured by defendants with the injury, nor any evidence that respondent knew of facts which would connect it. The injured party himself said that the injury arose out of negligent maintenance and unsafe condition of appellants' loading dock.

4. Appellants motion for summary judgment cannot be granted because the reasonableness and good faith of appellants settlement is disputed by respondent.

5. The injury was covered by workmen's compensation and coverage is excluded by the express terms of respondent's policy, as it was an obligation for which the insured or its insurer could be held liable under the Workmen's Compensation Law.

6. The policy written by the real party in interest in this case specifically covers the injury so in any event its insurance would be primary.

7. The clauses involved cannot be used to extend coverage to an insured.

None of the cases cited by respondent, except perhaps one, would extend coverage under the loading and unloading and omnibus clauses to the extent it is advocated by appellants here, whereas cases involving like situations specifically exclude coverage. For the foregoing reasons, the summary judgment granted to re-

spondent should be affirmed. In the event it is not affirmed, factual questions, particularly those relating to the reasonableness of the settlement, would preclude summary judgment for appellants.

Respectfully submitted,

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